Community Health Services, Inc., d/b/a Mimbres Memorial Hospital *and* Nursing Home and United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC. Case 28–CA–17777

June 30, 2004

DECISION AND ORDER

BY MEMBERS LIEBMAN, SCHAUMBER, AND MEISBURG

On September 24, 2002, Administrative Law Judge Thomas M. Patton issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions[1] and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Community Health Services, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, Deming, New Mexico, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

[1] In affirming the judge's finding that the Respondent unlawfully refused to provide the Union with the names, addresses, and seniority dates of unit employees, we note that this information was presumptively relevant.

The judge described *Maple View Manor*, 320 NLRB 1149 (1996), as holding that lists of current employees, including their names, dates of hire, last known addresses, telephone numbers, social security numbers, rates of pay, and job classifications are presumptively relevant. As the Board stated in that case, social security numbers are not presumptively relevant. Id. at 1151 fn. 2.

Dated, Washington, D.C. June 30, 2004

Wilma B. Liebman,	Member
Peter C. Schaumber,	Member
Ronald Meisburg,	Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to provide United Steelworkers Of America, District 12, Subdistrict 2, AFL–CIO, CLC, on request, information necessary and relevant to the Union's duty as the employees' bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the information requested by its letters dated October 16 and November 7, 2001, and January 31, 2002.

COMMUNITY HEALTH SYSTEMS, INC., D/B/A MIMBRES MEMORIAL HOSPITAL AND NURSING HOME

Richard A. Smith, Esq., for the General Counsel.
Don T. Carmody, Esq., P.C, of Woodstock, New York, for the Respondent.
Freddie Sanchez, Staff Representative, of Tucson Arizona, for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS M. PATTON, Administrative Law Judge. The complaint alleges violations of the National Labor Relations Act (the Act) by Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home (the Respondent). The complaint issued on April 17, 2002, based on a charge filed by the United Steelworkers of America, District 12, Subdistrict 2, AFL–CIO, CLC (the Union) and served on February 28, 2002.[1] The Respondent filed a timely answer to the complaint denying any violation of the Act and raising affirmative defenses. The case was assigned to me for hearing. The hearing was scheduled for July 9, 2002, and was thereafter ordered postponed indefinitely to permit the parties to submit the case on a stipulated record.

Pursuant to Section 102.35(a)(9) of the Rules and Regulations of the Board the parties submitted a proposed stipulation of facts (the stipulation) signed by all parties on July 15, 2002, and filed with the Division of Judges the following day. I approved the proposed stipulation by order of July 17, 2002. On the entire record and after considering the briefs filed by the Respondent and the General Counsel, I make the following

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

At all material times the Respondent, a New Mexico corporation, with an office and place of business in Deming, New Mexico, has been engaged in the operation of a hospital and nursing home providing inpatient and outpatient medical care. The stipulation establishes that the Respondent meets the Board's standards for asserting jurisdiction. The parties stipulate, the record establishes, and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and a health care institution within the meaning of Section 2(14) of the Act. The parties stipulate, the record establishes, and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Stipulated Facts and Positions of the Parties[2]

On or about March 13, 1996, the Respondent assumed the operation of Mimbres Memorial Hospital and Nursing Home (the Hospital), in Deming, New Mexico, previously operated by the Luna County, New Mexico. Since it assumed the operation of the Hospital the Respondent has continued to operate the Hospital in basically unchanged form, at the same location, providing the same healthcare services.

On or about July 18, 1995, the Union was certified by the Public Employees Labor Relations Board of the State of New Mexico as the exclusive collective-bargaining representative of two collective-bargaining units The units are referred to as unit A and unit B and collectively as the units.

It is alleged that the following employees of the Respondent at the Hospital, unit A, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, and confidential employees as those terms are defined under the Act and Board's rules and regulations.

The complaint alleges that following employees of the Respondent at the Hospital, unit B, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, and confidential employees as those terms are defined under the Act and Board's rules and regulations.

At the time the Respondent assumed the operation of the Hospital the Respondent employed as a majority of its employees in the units individuals who were previously employees of Luna County at the Hospital. The parties stipulate, the record establishes, and I find that when the Respondent assumed the operations of the Hospital the Respondent has continued to be the employing entity and is a successor to Luna County.

There have been two prior cases where the Respondent's duty to bargain with the Union regarding the units has been litigated. The first was *Mimbres Memorial Hospital*, 337 NLRB 998 (2002) *(Mimbres I).* Administrative Law Judge James L. Rose issued his decision on August 2, 2000, and the Board's decision and order issued August 1, 2002, prior to the filing of briefs in the present case.

In *Mimbres I*, the Board found the units to be appropriate and that the union was the collective-bargaining representative of the employees. The Board order required, in part, that the Respondent cease and desist from failing to furnish on request information necessary and relevant to the Union's duty as the employees' bargaining representative. The Respondent states, in substance, that it will not comply with the Board's order in *Mimbres I* unless and until the Board's order is enforced in court.[3]

The second case was heard by Administrative Law Judge Lana H. Parke at a hearing held on March 13, 2002. Judge

[1] The charge alleges that the respondent refused to supply information to the Union since on or about October 16, 2001.

[2] By agreement during a conference call, the stipulation also incorporates a statement of the position of the parties on the issues.

[3] Respondent's attorney states on brief mailed September 5, 2002, that Respondent had petitioned the Court of Appeals for the District of Columbia to review the Board's decision in *Mimbres I*. On September 16, 2002, the office of the Clerk of that court was unable to confirm in response to an administrative inquiry that such a request for review had been filed.

Parke issued a decision in the second case, JD(SF)–38–02, on May 13, 2002 *(Mimbres II)*. *Mimbres II* is pending before the Board on exceptions. The complaint in *Mimbres II* alleges that Respondent violated Section 8(a)(1) and (5) of the Act by refusing to recognize and bargain with the Union since March 28, 2000.

The stipulation incorporates the charge, complaint, and answer in the present case, as well as the transcript and exhibits in *Mimbres II* and Judge Rose's decision in *Mimbres I*. I take official notice of JD(SF)–38–02.[4]

The answer to the complaint denies that either of the units is appropriate. The parties stipulate, however, that Respondent conceded in *Mimbres I* and *Mimbres II* that unit "B" was appropriate, but denied that unit "A" was appropriate. The stipulation states that Respondent continues to contend that unit "A" is not appropriate. The Respondent seeks to preserve its defenses that the Union does not represent a majority of employees in an appropriate unit.

The complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act when it refused to furnish information to the Union as the certified collective-bargaining representative of the units. Specifically, the complaint alleges that on October 16 and November 7, 2001, and January 31, 2002, the Union submitted written requests to the Respondent that it provide the Union with the names, addresses, and seniority dates of all employees in the units and that the Respondent has refused to provide the requested information.

The Respondent admits that the Union requested the information as alleged in the complaint and that it has refused to supply the information.

The answer to the complaint alleges that it had no duty to bargain with the Union because the Union did not have majority status at the time of the alleged unfair labor practices. The stipulation reflects that Respondent's position relative to the Union's loss of majority status is summarized in Judge Parke's decision in *Mimbres II* as follows:

> Respondent's stated bases for a good-faith doubt of the Union's majority status prior to its withdrawal of recognition are that (1) no employee had ever become a member of the Union, (2) negotiations over a 4-year period had produced no agreement, (3) substantial employee turnover had occurred, (4) the Union did not communicate with employees, and (5) the employee representative of the Union rather than union officials had dealt with Respondent.

The General Counsel asserts that none of the criteria that the Respondent relied on in withdrawing recognition from the Union are valid under Board law.

The Respondent's answer to the complaint raises other affirmative defenses, which are discussed in the next section.

[4] Respondent's attorney states on brief mailed September 5, 2002, that Respondent had petitioned the Court of Appeals for the District of Columbia to review the Board's decision in *Mimbres I*. On September 16, 2002, the office of the clerk of that court was unable to confirm in response to an administrative inquiry that such a request for review had been filed.

B. Analysis

Based on *Mimbres I*, I conclude that the units are appropriate for collective-bargaining purposes and that at all times material the Union has been, and is now the exclusive representative of the employees in the units.

An employer is obligated, on request, to furnish a union with requested information that is potentially relevant and necessary for its use in carrying out its responsibilities as the employees' collective-bargaining representative. *NLRB. v. Acme Industrial Co.*, 385 U.S. 432 (1967). The General Counsel contends that by failing and refusing to furnish the Union with the names, addresses, and seniority dates of bargaining unit employees the Respondent violated Section 8(a)(1) and (5) of the Act. In support of this contention the General Counsel points to the Board's decision in *Maple View Manor*, 320 NLRB 1149 (1996), where the Board held that lists of current employees, including their names, dates of hire, last known addresses, telephone numbers, social security numbers, rates of pay, and job classifications are presumptively relevant and must be furnished to the exclusive collective-bargaining representative on request.

Respondent urges as affirmative defenses (1) that litigation of the three refusals to provide information are barred by the 6-month limitations period in Section 10(b) of the Act; (2) that the alleged refusals to furnish information are merely derivative of *Mimbres I* and *II*; (3) that the complaint is an attempt to litigate compliance issues related to *Mimbres I* and *II*; (4) that the complaint is based on facts known to the General Counsel at the time of the hearing in *Mimbres II*; and (5) that the complaint denies Respondent due process.

The Respondent contends that the complaint should be dismissed because it is based on facts that the General Counsel knew at the time of the hearing in *Mimbres II*. Respondent argues that the evidence satisfies the standards established in the Board's opinion in *Highland Yarn*, 310 NLRB 644 (1993), based on *Jefferson Chemical*, 200 NLRB 992 (1972); and *Peyton Packing Co.*, 129 NLRB 1358 (1961).[5]

In *Highland Yarn* the Board stated:

> [T]he General Counsel may not litigate an unfair labor practice allegation predicated on events which the General Counsel knew or should have known about when issuing an earlier complaint or at the time of the trial in that earlier complaint, if that allegation is of the same general nature as, or is related to, an allegation in the earlier complaint.
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> . . . .
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> Under *Jefferson Chemical* and *Peyton Packing* principles, the General Counsel may litigate complaint allegations in a subsequent proceeding if he was unaware of the events that form the basis for the allegations at the time of the earlier hearing and the events were not commonly

[5] The affirmative defenses are not addressed in the General Counsel's brief. Similar defenses were raised in *Mimbres II*. There the judge concluded that the General Counsel had attempted to relitigate certain conduct that had been at issue in *Mimbres I* and declined to consider that evidence based on *Jefferson Chemical* considerations, but otherwise found that the affirmative defenses had no merit.

> known or readily discoverable after investigation, or the events were independent acts. However, once a respondent has made a prima facie showing under *Jefferson Chemical*, we believe that the burden shifts to the General Counsel to rebut that showing. More particularly, if a respondent shows that the allegations of a "new" complaint pertain to events that occurred prior to the hearing in an earlier case and that these new allegations are closely related to the allegations of the earlier case, the burden shifts to the General Counsel to show that he did not know, and could not reasonably have discovered, the earlier events at the time of the hearing in the earlier case or that the allegations of the new complaint are not closely related to the allegations of the earlier case.

310 NLRB at 644–645; citation omitted.

The requirements of a *Highland Yarn* defense are clearly satisfied in the present case. The refusals to provide information occurred prior to the hearing in *Mimbres II* and the alleged refusals to provide information are closely related to the allegations of *Mimbres II*. Thus, the information at issue was sought at the same time that the Union was demanding that the Respondent meet and bargain regarding those employees. Sanchez sent written bargaining demands to Respondent approximately every other week from August 2000 through the time of the *Mimbres II* hearing. It was during the same period that the requests for information were made. The alleged 8(a)(1) and (5) violations in *Mimbres II* and those in the present case were integral parts of the Respondent's consistent refusal to bargain, beginning with the events described in *Mimbres I*. The General Counsel does not deny knowledge of the facts relating to the refusals to provide information at any relevant time. It appears that the General Counsel knew or should have known about the refusals to provide the information well in advance of the *Mimbres II* hearing. Freddie Sanchez was the General Counsel's principal witness in *Mimbres II* as well as the present case.

Although not acknowledged by Respondent's attorney, *Highland Yarn* has been largely overruled and *Jefferson Chemical* and *Peyton Packing* have been narrowly limited to fact situations unlike the present case. See *Service Employees Local 87 (Cresleigh Management)*. 324 NLRB 774, 775 fn. 3 (1997); *Frontier Hotel & Casino*, 324 NLRB 1225 (1997); *Caterpillar. Inc.*, 332 NLRB 1116 (2000). Citing *Cresleigh*, the Board held:

> [E]xcept in the specific circumstances presented in *Peyton Packing* and Jefferson *Chemical*, where the General Counsel has attempted to "twice litigate the same act of conduct as a violation of different sections of the Act 9 or to relitigate the same charge in different cases, the Board has recognized that such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases (citations omitted).

Frontier Hotel & Casino, 324 NLRB at 1226.

The discretion of the General Counsel recognized in *Cresleigh* to determine which cases to consolidate will be upheld absent a showing of arbitrary abuse of discretion. Even where the General Counsel fails to consolidate cases that the Board feels should have been consolidated, the Board will not dismiss the complaint in the absence of a showing of prejudice to the respondent. *New Surfside Nursing Home*, 330 NLRB 1146, 1151 (2000). No such showing of prejudice has been made in the present case. Accordingly, I find that the Respondent has not proved a defense under *Peyton Packing* and *Jefferson Chemical*.

The Respondent's related claim of denial of due process by the separate litigation of the present case has no merit. The decision to separately litigate the information requests is within the discretion of the General Counsel. The Board in *Cresleigh Management*, 324 NLRB at 776, stated:

> We share our colleague's concern for efficient casehandling, conservation of the Board's resources, and avoiding harassment of or prejudice to respondents, and we have no doubt that the General Counsel does, too. We also expect that, in the great majority of cases, the General Counsel's desire to achieve those ends would lead him to consolidate outstanding issues for trial, rule or no rule. Unlike the dissent, however, we are unwilling to assume that consolidation will serve those ends in every case, and we have confidence in the General Counsel's ability to discern when it will do so and when it will not.

The Respondent's other affirmative defenses are also without merit. Respondent has provided no authority and no convincing rationale for denying issuance of an order to remedy the refusals to provide information prior to the conclusion of the litigation of *Mimbres I* and *Mimbres II*.

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The following described units are appropriate for collective-bargaining purposes:

UNIT A

All service, maintenance and clerical employees employed by the Respondent, but excluding technical and all other positions as well as supervisory, managerial, and confidential employees as those terms are defined under the Act and Board's rules and regulations.

UNIT B

All technical employees employed by the Respondent, but excluding service, maintenance, clerical, and all other employees as well as supervisory, managerial, and confidential employees as those terms are defined under the Act and Board's rules and regulations.

4. The Union, since March 13, 1996 has been and is, the exclusive representative of the employees in unit A and unit B for the purposes of collective bargaining within the meaning of Section 9(a) of the Act.

5. By failing and refusing to provide the Union with relevant information requested by the Union on October 16 and Novem-

ber 7, 2001, and January 31, 2002, specifically the names, addresses, and seniority dates of all employees in unit A and unit B, the Respondent has violated Section 8(a)(1) and (5) of the Act.

THE REMEDY

Having found that Respondent engaged in unfair labor practices, I recommend that it be ordered to cease and desist therefrom and to take the affirmative action described below to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Community Health Systems, Inc., d/b/a Mimbres Memorial Hospital and Nursing Home, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing to furnish on request information necessary and relevant to the Union's duty as the employees' bargaining representative.

(b) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Furnish to the Union in a timely manner the information requested by the Union on October 16 and November 7, 2001, and January 31, 2002.

(b) Within 14 days after service by the Region, post at its Deming, New Mexico facility copies of the attached notice. Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 16, 2001.

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated San Francisco, California, September 24, 2002

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to provide United Steelworkers Of America, District 12, Subdistrict 2, AFL–CIO, CLC, on request, information necessary and relevant to the Union's duty as the employees' bargaining representative.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL provide the Union with the information requested by its letters dated October 16, 2001, November 7, 2001, and January 31, 2002.

COMMUNITY HEALTH SYSTEMS, INC., D/B/A MIMBRES MEMORIAL HOSPITAL AND NURSING HOME

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.